
(1994) 02 RAJ CK 0029

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No's. 145 and 147 of 1991

Govan Industries Corporation and Gautam Cable Industries	APPELLANT
Vs	
Rajasthan State Electricity Board and Others	RESPONDENT

Date of Decision : 09-02-1994

Acts Referred:

Arbitration Act, 1940 — Section 20

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : (1997) 88 CompCas 387 : (1994) 1 WLC 570

Hon'ble Judges : Milap Chandra Jain, J

Bench : Single Bench

Advocate : R.C. Saxena, for the Appellant; G.C. Grag, respondents Nos. 1 and 2, Sudhir Gupta, respondent No. 3, for the Respondent

Final Decision : Dismissed

Judgement

Milap Chandra Jain, J.—These two miscellaneous appeals have been filed against similar orders of the learned District Judge, Jaipur City, dated November 27, 1990, by which applications of the petitioner-appellants moved under Order 39, rules 1 and 2 of the Civil Procedure Code, 1908, have been dismissed. The facts of the cases giving rise to these appeals may be summarised thus.

2. In the year 1984, the appellants submitted two tenders for the supply of cables. They were accepted. Two agreements were accordingly executed. They furnished bank guarantees, one for the security and the other for the performance. Respondents Nos. 1 and 2 did not make payment as per agreements and deducted certain amounts. In each case, they requested for appointment of an arbitrator under Clause 31 of the agreements but they did not appoint any arbitrator. Applications u/s 20, Arbitration Act (hereinafter to be called "the Act"), for the appointment of an arbitrator were moved. Along with these applications, applications under

3. Order 39, Rules 1 and 2 read with Section 151 of the Civil Procedure Code, 1908, and Section 41 of the Act were also moved for restraining respondents

Nos. 1 and 2 from encashing the bank guarantees. The applications moved u/s 20 of the Act were allowed but applications moved under Order 39, Rules 1 and 2 of the Civil Procedure Code, 1908, were dismissed by the impugned orders.

4. It has been contended by learned counsel for the appellants that the learned District Judge has failed to consider that the bank guarantees were given for the performance of the agreements, they were conditional guarantees for the replacement of defective goods, they were parts of the main agreements, the Chief Engineer (MM), Rajasthan State Electricity Board (respondent No. 2), did not mention in his letters addressed to the Indian Overseas Bank (respondent No. 3) that goods supplied were defective and the learned District Judge has not correctly understood the law laid down in *Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others*, .

5. In reply, it has been contended by learned counsel for the respondents that a contract of bank guarantee is an independent contract, it is separate from the original contract, a bank guarantee can be encashed as per its terms, injunction can be issued against the bank in case of fraud only and it has nothing to do with the disputes arising out of the original contract in which the bank is not a party. He further contended that it is clear from the letters issued by the Chief Engineer (MM) (respondent No. 2) that the respondent-bank was requested to encash the bank guarantees as the appellants failed to deposit the recoverable amounts as per terms of the agreements executed in between the appellants and respondents Nos. 1 and 2 and the conditions of the bank-guarantee were duly fulfilled. He relied upon *H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others*, ; *Hindustan Paper Corporation Ltd. v. Keneilhouse Angami* 1990 1 68 Comp Cas 361 (Cal) ; 2 Bank CLR 1 ; *General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another*, ; *Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others*, ; *Syndicate Bank Vs. Vijay Kumar and others*, and *Vijay-singh Amarsingh and Co. v. Hindustan Zinc Ltd.* [1992] 1 BCLR 672.

6. The relevant portions of the bank guarantee, furnished in the case giving rise to Miscellaneous Appeal No. 145 of 1990, run as under :

"The bank hereby guarantees to the Chief Engineer, Rajasthan State Electricity Board, the fulfilment by the contractors of the various obligations imposed on them under the aforesaid contract including the obligations of the contractors to supply materials of good quality and workmanship and the bank further guarantees to the Rajasthan State Electricity Board that the contractors shall substitute and supply free of cost any material that may be required due to defects arising from faulty material, design and workmanship and the bank undertakes to indemnify and keep the Chief Engineer, Rajasthan State Electricity Board indemnified to the extent of Rs. 1,99,372 (rupees one lakh ninety-nine thousand three hundred and seventy-two only) against any loss or damage that may be caused to or suffered by the Rajasthan State Electricity Board or by reason of any failure by the contractors to supply materials of good quality, design and workmanship as aforesaid and further undertake to pay to the Chief

Engineer, Rajasthan State Electricity Board on demand a sum not exceeding Rs. 1,99,372 (rupees one lakh ninety-nine thousand three hundred and seventy-two only) in the event of the contractor failing or neglecting to perform and discharge the aforesaid duties and obligations on their part to be observed and performed under the said contract.

The decision of the Chief Engineer, Rajasthan State Electricity Board, as to whether the contractors have failed or neglected to perform or discharge their duties and obligations as aforesaid and as to the amount payable to the Chief Engineer, Rajasthan State Electricity Board, by the bank herein shall be final and binding on the bank."

7. A similar guarantee was given in the other case. The difference is only in respect of the guarantee amount. It is Rs. 2,33,420.

8. The underlined portions of the above-quoted paragraphs of the bank guarantee are very significant and wide. They cover any failure in fulfilment of any term or condition of the agreement executed in between the appellant and respondents Nos. 1 and 2. According to the above-quoted para No. 2, the decision of the Chief Engineer, Rajasthan State Electricity Board (respondent No. 2), shall be final and binding on the bank as to whether the appellant has failed or neglected to perform or discharge its duties and obligations. Letter No. RSEB/CE/MM/SAO/Proc.I/IN 1245/D 3137, dated September 29, 1989, paper No. 8C/5, was written by the Chief Engineer (MM) (respondent No. 2) to the respondent-bank for remitting the amount of Rs. 72,116.60 under the said bank guarantee. It is clearly mentioned in it that the appellant had not deposited the amount of Rs. 72,116.60. It also shows that letter No. 2728, dated September 7, 1988, was also written in this connection. In para No. 7 of the reply, it has been stated that the appellants did not supply the agreed materials in time and as such the Rajasthan State Electricity Board was entitled to recover pre-estimated damages and to operate the bank guarantees. Para No. 25 of the conditions of contract runs as follows :

"25. Damages for delay in completion.--If the contractor fails in the due performance of his contract within the time fixed by the contractor and extension thereof, and the purchaser shall have suffered any loss from the delay extension occasioned by such failure, the contractor agrees to accept the reduction of contract price of 1/2 per cent. per week or part thereof reckoned on the contract value of such portion only of the plant as cannot in consequence of the delay be used commercially and efficiently during each week between the appointed or extended time, as the case may be, and the actual time or acceptance under Clause 27, and such reduction shall be in full satisfaction of the contractor's liability for delay, but shall not in case exceed 5 per cent. of the contract value of such portion of the plant."

9. Paragraph No. 10 of the general conditions of contract runs as follows :

"10. Delay in delivery.--(a) The time for and the date of delivery specified in the

purchase order shall be deemed to be essence of the contract and the supplies shall have to be completed not later than the period specified therein. Should the supplier fail to deliver the material/equipment on order" or any part thereof within the specified delivery period, the purchaser shall be entitled at his option :

(i) To recover from the supplier, 1/2 per cent. (half per cent.) of the value of the material/equipment which the supplier has failed to deliver in time for each week or part thereof during which the delivery of such material/equipment shall be in arrears. The recovery of such amount will be limited to 10 per cent. (ten per cent.) of the value of the delayed/ undelivered goods."

10. It cannot, therefore, be said that under the terms and conditions of the bank guarantee, they could not be operated. No case of fraud has been put forward by the appellants. It is well-settled law that courts should not normally grant injunction restraining the performance of contractual obligations arising out of bank guarantees. Commitments of the bank must be honoured free from interference by courts. Indiscriminate interference by courts in such matters would cause irreparable damage to the commercial world as a whole. Banks are the "life blood" of international commerce. It has been observed in *Hindusthan Paper Corporation Limited Vs. Keneilhouse Angami*, , as follows (at page 369) :

"In our opinion, the point is now well settled. A bank guarantee may be furnished in terms of a particular contract between two parties. In terms of the conditions of the contract a bank guarantee may be provided by a bank in favour of one of the parties to the original contract (hereinafter called the "beneficiary"). As to the question of enforcement of the bank guarantee by the beneficiary against the bank, the rights and liabilities are to be governed by the bank guarantee itself and not by the terms and conditions of the original contract. The bank guarantee itself is a contract separate from the original contract pursuant to which the bank guarantee is furnished. The bank is not a party to the original contract. Similarly, the party at whose instance the bank guarantee is furnished pursuant to the agreement, is not a party to the bank guarantee. The bank guarantee is to be enforced if it complies with the terms and conditions of the bank guarantee itself and not when there is any default or breach of the terms and conditions of the main contract. If the condition- for payment under the bank guarantee is fulfilled, then such payment is to be made to the beneficiary though ultimately it may be open to the party at whose instance the bank guarantee was furnished to file a suit for damages against the other parties to the contract. It is open to such parties also to file any suit against the bank for recovery of any amount, if any, if the bank has acted contrary to the transaction between the bank and such other parties. That is no ground for holding that the original contract is to be treated as part of the guarantee or that the arbitration agreement in the original contract can be incorporated in the bank guarantee. If the two contracts are separate, the arbitration clause in the original contract cannot be imported in the contract of bank guarantee. In that event, the arbitration clause in the parent contract cannot include the question as to whether the terms and conditions of

the bank guarantee have been fulfilled. Whether the bank guarantee is enforceable or not does not depend on the terms and conditions of the original contract. In this particular case, Clause (b) as such makes it quite clear that the alleged dispute sought to be raised therein is the dispute regarding the right of the beneficiary under the bank guarantee to enforce the bank guarantee as against the bank. It has nothing to do with any breach of contract by the beneficiary under the parent contract. A claim arising out of a bank guarantee is not a dispute arising out of the original contract. As we have pointed out, Clause (b) as such relates to the right of the beneficiary against the bank on the basis of the said bank guarantee and not the right of the beneficiary as such against the other party to the contract under the said original contract. The original arbitration agreement may be very wide or general in terms, but that certainly does not include a dispute arising under a separate agreement with a separate party, that is, the bank guarantee and the bank."

11. It has been observed in *General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another*, as follows :

"The bank has to pay and the bank was willing to pay as per the undertaking. The bank cannot be interdicted by the court at the instance of respondent No, 1 in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties. The High Court, in the absence of prima facie case on such matters, has committed an error in restraining the bank from honouring its commitment under the bank guarantee."

12. Paragraphs Nos. 11 and 12 of the decision given in *Syndicate Bank Vs. Vijay Kumar and others*, run as under (at page 605 of 74 Comp Cas) :

"In this context it is also necessary to consider the extent to which the court can go into the nature of the securities offered for the bank guarantee in the light of the banker's lien. In *United Commercial Bank Vs. Bank of India and Others*, , this court referred to a passage from *R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* 1977 2 All ER 862 (QB) with approval which runs as under (at page 207 of 52 Comp Cas) :

"It was only in exceptional cases that the courts would interfere with the machinery of irrevocable obligations assumed by banks. They are the life blood of international commerce. . . The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise trust in internal commerce could be irreparably damaged."

13. In *R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* 1977 2 All ER 862 (QB), it was stated in the head note as under (at page 863) ;

"(i) Only in exceptional cases would the courts interfere with the machinery of irrevocable obligations assumed by banks. In the case of a confirmed performance guarantee, just as in the case of a confirmed letter of credit, the bank was only concerned to ensure that the terms of its mandate and

confirmation had been complied with and was in no way concerned with any contractual disputes which might have arisen between the buyers and sellers . . ."

The above passage has also been referred to in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , wherein this court held that the aforesaid represents the correct state of the law. In this case, this court has affirmed the obligation of payment without dispute by the bank in the Indian context in cases relating to bank guarantees. But it is equally obvious that the same liability or obligation on the part of the bank will not be there when the bank guarantee is discharged and this needs no emphasis.

From the above discussion, it can be gathered that the bank guarantees are on a different level and they must be allowed to be honoured free from interference by courts and a bank which gives a guarantee must honour the same according to its terms and it is only in exceptional cases that the court will interfere with the machinery of irrevocable obligations assumed by the bank. A fortiori, the same principle applies in respect of bank guarantees which are discharged. When once the bank guarantee is discharged, the obligation of the bank ends and there is no question of going behind such discharged bank guarantee. Courts should refrain from probing into the nature of the transactions between the bank and the customer which led to the furnishing of the bank guarantee."

14. In any view of the matter, the discretion exercised by the learned District Judge, Jaipur City, in refusing temporary injunction cannot be said to be arbitrary or perverse. Thus, there is no force in the appeals.

15. Accordingly, the appeals are dismissed. No order as to costs.